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In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, for the County of Riverside,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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People v. Harmer, et al., Riverside County, CR No. 17751	2

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People v. Hogan, (Crim. No. 20943)	11
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People v. Mozingo, Sacramento County, CR No. 57063	2
People v. Mroczko, (Crim. No. 21159)	11
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Richards v. Superior Court, 86 Cal.App.3d 265, 150 Cal. Rptr. 77 (1978) 19

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) 3, 9, 10, 13, 15

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Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) 20

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United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) 3, 9, 14, 15, 16

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White v. Davis, 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P. 2d 222 (1975) 19

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968) 8

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California Government Code, Section 6250	9, 19
California Penal Code:	
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Supreme Court Rule, Rule 42	1

Other Authorities

Alvarez, Nancy Lewis, Racial Bias and the Right to an Impartial Jury: A Standard For Allowing Voir Dire Inquiry, 33 Hastings L.J. 959 (1982)	12
Auerback and Kiernan, "Public Wants Court Reform, Poll Says," The Washington Post, March 19, 1978, page A2	12
Broeder, Voir Dire Examinations: An Empirical Study 38 So. Cal. L. Rev. 503 (1965)	15, 21
Epstein, Jeffrey M., Criminal Procedure—Voir Dire—The California Supreme Court Permits Voir Dire to Be Conducted To Uncover a Basis for Peremptory Challenges, 4 Whitt. L. Rev. 169 (1982)	12
Fieldscope Report: Attitudes Toward the Death Penalty Among The California Adult Public, Field Research Corp. of San Francisco for the National Council of Crime and Delinquency (March 1981)	12
Gorney, "After the Riot: The Crisis In San Francisco," The Washington Post, May 30, 1979, page B2	13

Table of Authorities Cited

Other Authorities

Page

Hunt, P.A., Minimizing Racism in Jury Trials—Voir Dire Conducted by Garry, C.R. in People of California v. Newton, H.P., 65 Law Library Journal 110 (1972) 12

Maxwell, The Case of the Rebellious Juror (1970) 56 A.B.A.J. 838 5

Millet, Craig H., Waine, Tina I., Voir Dire Examinations, 8 Pepperdine L. Rev. 504 (1981) 12

Moskitis, Richard L., The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies, 49 So. Cal. L. Rev. 597 (1976) 12

Saltzman, Alan, Jury Voir Dire Expanded, 94 L.A. Daily J. 4 (July 16, 1981) 12

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Voir Dire Limitations As A Means Of Protecting Jurors' Safety and Privacy, 93 Harv. L. Rev. 782 (1980) 19

Title, Julius M., Voir Dire Examination Of Jurors in Criminal Cases, 43 Cal. State Bar J. 70 (1968) 5, 6, 7

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amici hereby respectfully submit the attached Brief of Amici Curiae in support of Petitioner. The written consent of the parties has been obtained pursuant to Rule 42 and is being filed concurrently with this brief which is filed within the time permitted to file Petitioner's Brief.

Amici are publishers of numerous newspapers in California which regularly provide the public with information about criminal trials and other aspects of the California criminal justice system, a voluntary trade association representing daily and weekly newspapers primarily in California, and a nonprofit organization representing educators and journalists from the print and broadcast media.

Although Petitioner has developed the issues relating to the specific constitutional errors in this case, additional analysis is necessary to demonstrate the statewide scope of the problem presented by closure of *voir dire*.

As the result of the California Supreme Court's decision in *Hovey v. Superior Court*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980), trial judges have been closing the *voir dire* phase of the trial in capital cases with alarming frequency.[1] The closed proceedings are of acute concern

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[1]Amici are aware of the following capital cases that have been tried after the *Hovey* decision in which some or all of the *voir dire* has been closed:

People v. Boyle, Riverside County, CR No. 18348.
People v. Rodriguez, San Mateo County, CR No. C-8773.
People v. Hawkins, Shasta County, CR No. 68841.
People v. Rich, Yolo County, CR No. 6629.
People v. Talamantez, San Diego County, CR No. 7556.
People v. Williams, San Diego County, CR No. 56218.
People v. Steed, San Diego County, CR No. 56218.
People v. Coleman, San Francisco, CR No. 101673.
People v. Hendrix, San Francisco, CR No. 105415.
People v. George Wayne Smith, et al., San Diego County, CR No. 6940.
People v. Alhert, Riverside County, CR No. 18348.
People v. Burgene, Riverside County, CR No. 18088.
People v. Corona, Alameda County, CR No. 68862.
People v. Gallego, Contra Costa County, CR No. 27054.

to Amici since such closures cause an immediate and irremediable loss of their First Amendment right to attend an important phase of the trial, thereby undermining the ability of the press to fulfill its responsibility to the public of reporting on these proceedings. In addition, an analysis of the public interests served by open *voir dire* proceedings in California will be helpful to the Court.

I

SUMMARY OF ARGUMENT

When the public is denied access to the *voir dire* of prospective jurors, it is excluded from one of the most critical phases of the trial. Indeed, the *voir dire* examination entails the selection of twelve citizens who are adjudged qualified to determine fairly and impartially the guilt or innocence of the defendant, and whether the defendant shall be sentenced to die. This process, with its exploration of juror attitudes, perceptions, prejudices and prior knowledge of the case, therefore is central to the public's understanding and acceptance of either the acquittal of the defendant or the imposition of the most severe and controversial of sanctions—the death penalty.

The need to ensure a public right of attendance during *voir dire* is even more compelling in light of the fact that no countervailing interest is served by denying access to this phase of the criminal trial.

People v. Harmer, et al., Riverside County, CR No. 17751.
People v. Bolin, Sacramento County, CR No. 62203.
People v. Bayles, et al., Sacramento County, CR No. 56044.
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People v. Babbit, Sacramento County, CR No. 60132.
People v. Bean, Sacramento County, CR No. 58725.
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People v. Gallegos, Sacramento County, CR No. 60161.
People v. Webster, et al., Sacramento County, CR No. 62613.

II

THE HISTORY AND FUNCTION OF VOIR DIRE IN CALIFORNIA DEMONSTRATE THAT THIS PROCEDURE COMES WITHIN THE ESTABLISHED FIRST AMENDMENT RIGHT TO ATTEND CRIMINAL TRIALS

In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), seven justices of this Court recognized a constitutional right of the press and public to attend criminal trials. Both federal and state courts have expressly held that the *voir dire* examination of potential jurors is an integral part of the trial,[2] and, therefore, the question presented by this case has already been answered by the opinions in the *Richmond Newspapers* case. Moreover, an examination of the history and function of *voir dire* in California demonstrates that the jury selection process is central to the criminal justice system, and, accordingly, comes within the rationale developed in support of the right of access in *Richmond Newspapers.*

A. The History Of The Voir Dire Examination In California

The common law history of *voir dire,* which is developed in other briefs in this matter, demonstrates that the examination of jurors traditionally was conducted publicly both in England and the American colonies even before the drafting of the United States Constitution. When California achieved statehood in 1850, *voir dire* practice followed the common law. *People v. Crowe,* 8 Cal.3d 815, 821, n.1, 106 Cal.Rptr. 369, 506 P.2d 193 (1973).

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[2] *United States v. Brooklier,* 685 F.2d 1162, 1167 (9th Cir. 1982); *In re United States ex rel. Pulitzer Pub. Co.,* 635 F.2d 676 (8th Cir. 1980); *United States v. Woods,* 364 F.2d 481, 483 (3d Cir. 1966); *Commercial Printing Co. v. Lee,* 262 Ark. 87, 553 S.W.2d 270 (Ark. 1977); *Great Falls Tribune v. District Court, Etc.,* 608 P.2d 116, 120-121 (Mont. 1980).

Significantly, throughout its historical evolution, the California courts have recognized consistently that *voir dire* is part of the trial. *People v. Murphy,* 35 Cal.App.3d 905, 925-926, 111 Cal.Rptr. 295 (1973); *People v. Teitelbaum,* 163 Cal.App.2d 184, 206-207, 329 P.2d 157 (1958). Further, this evolution demonstrates that there is no special aspect of *voir dire* practice in this State that justifies any less stringent standards with respect to closure than for other phases of the trial.

The historical development of California *voir dire* practice following 1855 has been, in no small measure, a response to the creative efforts of attorneys to bend that process to their own adversarial needs. Prior to 1855, examination of a prospective juror was permitted only after interposition of a challenge for cause. *People v. Crowe, supra,* 8 Cal.3d at 821. After 1855, counsel were permitted the opportunity to examine prospective jurors to determine whether to interpose either a peremptory challenge or a challenge for cause. *People v. Backus,* 5 Cal. 275, 277 (1855). Once attorneys were given the right to participate, they began to recognize the importance of *voir dire* and to utilize it to their own advantage. *People v. Edwards,* 163 Cal. 752, 753, 127 P. 58 (1912).

In order to curb perceived abuses by attorneys seeking to precondition potential jurors to their clients' causes, the California courts and Legislature attempted periodically to limit the *voir dire* procedure. In 1912, for example, the California Supreme Court limited questioning to areas necessary to raise a challenge for cause. *People v. Edwards, supra,* 163 Cal. at 754-756.

In 1927, the Legislature sought to further limit questioning through amendment of California Penal Code Section 1078.[3] Subsequently, other legislative proposals have been

[3] In 1927 Section 1078 of the California Penal Code provided:

> It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant.

advanced to restrict the scope of *voir dire*, including unsuccessful efforts in 1971 and 1972. *People v. Crowe, supra*, 8 Cal.3d at 834, n. 1 (dissenting opinion).

In 1981, the permissible scope of *voir dire* examination was expanded in criminal cases to permit the parties to ask questions leading to the intelligent use of peremptory challenges. *People v. Williams*, 29 Cal.3d 392, 407, 174 Cal. Rptr. 317, 628 P.2d 869 (1981). In announcing this change, the California Supreme Court acknowledged that its decision did more to bring theory into accord with accepted practice in the state than to significantly change the scope of *voir dire* examination. *Id.*

After more than one hundred years of reform efforts, however, the California Supreme Court observed, somewhat cynically:

> The average trial manual bows in passing to the use of *voir dire* in obtaining a jury that is fair to both sides. Then it emphasizes that its greatest use is, in the words of the notorious Irish comic, Mr. Dooley, to get a jury that is 'more fair to wan side than the other.' Advice to the neophyte abounds in stratagems by which he may prejudice the jurors in favor of himself, his client and his case before the actual trial has started. Every field of human endeavor from psychiatry to animal magnetism and phrenology is to be used in observing the juror as the lengthy questioning proceeds. . . . *People v. Crowe, supra*, at 825, quoting Maxwell, *The Case of the Rebellious Juror* (1970) 56 A.B.A.J. 838, 841-842.

Not surprisingly, the Legislature, the courts and practitioners in California all continued to view *voir dire* as one of the most critical phases of the trial. Judge Julius M. Title, author of several articles on this subject, has written:

> . . . [P]ractically all experienced counsel in the criminal law field will agree that voir dire examination of jurors is generally the most vital phase of the trial

> of a criminal case. Such importance is suggested by the old time-worn adage that the trial of a cause is half over once the jury has been selected. Title, *Voir Dire Examination Of Jurors in Criminal Cases,* 43 Cal. State Bar J. 70, 71 (1968).

The historical development of *voir dire* in California as a procedure that is central to the criminal justice process underscores the legitimacy and importance of public access to this phase of the criminal trial.

B. The Function Of Voir Dire In California

In California, as elsewhere, the function of the *voir dire* in a criminal case is to permit the parties to select a jury of individuals who are qualified and competent to determine the facts of the case without bias, prejudice or partiality. *People v. Williams, supra,* 29 Cal.3d at 406.

Accordingly, the *voir dire* process is utilized in California to ensure a diversity of viewpoints among the jury, because it is believed such diversity helps to ensure neutrality. *Hovey v. Superior Court, supra,* 28 Cal.3d at 21-22. The object of this selection process is to obtain ". . . jurors [who] will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence and political affiliation. . . ." *Id.* at 23.

Given this objective of diversity, it is not surprising that *voir dire* in California generally consists of questions on a broad range of subjects designed to determine the attitudes of potential jurors who must ultimately render an impartial judgment based upon the facts of the particular case.[4] Even before the California Supreme Court broad-

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[4]In the instant case, the comments of counsel reflected in the transcript filed as part of the Joint Appendix indicate that the trial judge found questions about the jurors' sexual experiences, marriage problems and their voting records relevant to their impartiality.

ened the permissible scope of juror questioning in *People v. Williams, supra,* 29 Cal.3d 392, it recognized that *voir dire* examination might well explore:

> . . . the exposure of prospective jurors to pretrial publicity, and their attitude towards proposed defenses (e.g., insanity, diminished capacity, self-defense, or alibi), potentially controversial circumstances of the case (e.g., the race of the participants, the use of alcohol or drugs, or the presence of sexual activity), or important rules of law bearing on the trial (e.g., the defendant's right not to testify, presumption of innocence, truth beyond a reasonable doubt, or jury unanimity). *Hovey v. Superior Court, supra,* 28 Cal.3d at 81, n. 137.

The California Supreme Court assumed that questions about these matters, which might be considered sensitive by some individuals, would be asked of prospective jurors in open court. *Id.* at 81.

Although both judge and counsel participate in the *voir dire* (*People v. Crowe, supra,* 8 Cal.3d at 821), the California Supreme Court has continued to recognize and endorse the need for ". . . the considerable discretion of the trial court to contain *voir dire* within reasonable limits." *People v. Williams, supra,* 29 Cal.3d at 408; *People v. Crowe,* 8 Cal.3d at 826-827. The trial court, therefore, retains the power to limit questions designed merely to seek tactical advantage (*People v. Adams,* 21 Cal.App.3d 972, 979, 99 Cal.Rptr. 122 (1971)), as well as to eliminate improper or repetitious questions. *People v. Crowe, supra,* 8 Cal.3d at 821; Title, *Voir Dire Examination of Jurors in Criminal Cases, supra,* 43 Cal. State Bar J. at 87.

With respect to capital cases, the California Legislature has provided that the same jury will determine issues of guilt and penalty during separate deliberations. Cal. Pen. Code § 190.1. Accordingly, certain procedural protections attach to the *voir dire* in capital cases to allow the exclu-

sion for cause of jurors who have certain disqualifying views on the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *People v. Lanphear,* 26 Cal.3d 814, 841, 163 Cal.Rptr. 601, 608 P.2d 689 (1980); *People v. Hovey, supra,* 28 Cal.3d 1.

In commenting on the need to carefully review *voir dire* procedures, the California Supreme Court explained:

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death. *Hovey v. Superior Court, supra,* 28 Cal.3d at 81.

A procedure that is so essential to the dispensing of criminal justice should not be conducted behind closed doors. Public understanding and acceptance of the criminal justice system require that this aspect of the trial be conducted openly. Further, public attendance will enhance the functioning of the *voir dire* to ensure that the defendant ultimately obtains a trial by fair and impartial jurors.

III

PUBLIC POLICY CONSIDERATIONS UNDERLYING OPEN TRIALS FULLY APPLY IN THE CONTEXT OF VOIR DIRE

This Court has acknowledged repeatedly the importance of public review of the actions of all branches of government, including the criminal justice system. *Globe Newspaper Co. v. Superior Court,* ..... U.S. ....., 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). *Nebraska Press Asso. v. Stuart,* 427 U.S. 539, 559-560, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Craig v. Harney,* 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

California has made the same commitment. The Legislature has declared, ". . . access to information concerning the conduct of the people's business is a fundamental and necessary right for every person in this state." Cal. Gov. Code § 6250. The California courts, too, have recognized that the public has a legitimate and important interest in observing the functioning of judicial processes. *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529, 536, 93 Cal.Rptr. 866, 483 P.2d 34 (1971); *Brian W. v. Superior Court*, 20 Cal.3d 618, 626, 143 Cal.Rptr. 717, 574 P.2d 788 (1978).

This Court recognized that public access to criminal trials plays ". . . a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court, supra*, 73 L.Ed.2d at 256. In *Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S. at 569-571, four distinct benefits to the judicial process were identified which are derived from public attendance at trials;

1. Public scrutiny improved the quality of the trial;

2. Public access allowed for public understanding of the criminal justice system;

3. Public access fostered public confidence in the system; and

4. Public access contributed to a fuller community catharsis.

Each of these benefits of a public trial generally applies with at least equal force to the *voir dire*. Indeed, public access to the *voir dire* phase of the trial has a value particularly unique to that proceeding. As the Ninth Circuit Court of Appeals observed in *United States v. Brooklier, supra*, 685 F.2d at 1167:

> There can be no doubt of the importance of public scrutiny of the jury selection process to the effective functioning of the government as well as the judicial

> system itself. The meticulous care devoted to securing a fair and impartial jury exemplifies the search for even-handed justice characteristic of our system of criminal justice. Public access to the process will heighten public respect for that system. At the same time public scrutiny will encourage those who participate in the jury selection process to enhance the quality of the process and safeguard its integrity.

Thus, access to information about the jury selection procedure is essential to a public evaluation of one of the most important decision-making processes of government. As such, public access serves as an important check on the entire jury system and encourages public acceptance of the verdicts ultimately rendered. Because the jury's deliberation necessarily occur behind closed doors, public attendance during the *voir dire* phase is particularly important if there is to be any meaningful understanding of the jury system by the public.[5]

Also, access to *voir dire* furthers the public's ". . . fundamental, natural yearning to see justice done. . . ." (*Richmond Newspaper, supra,* 448 U.S. at 571) in the same manner that public access to other aspects of the criminal trial furthers that goal. If the criminal justice system is to fulfill the vital need for social retribution, then the process by which citizens are determined competent to render a verdict must be open to the public. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571.

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[5]Delayed dissemination of important information is not a substitute for the right to attend proceedings and trials. *Nebraska Press Asso. v. Stuart, supra,* 427 U.S. at 561. Therefore, the post-trial release of transcripts does not vindicate the First Amendment right of access. *Gannett Co. v. DePasquale,* 443 U.S. 368, 442 n.17, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (dissenting opinion of Justice Blackmun). In this case, the trial judge denied even this wholly inadequate substitute.

Furthermore, community catharsis cannot occur if the public is prevented from viewing the examination of those who determine guilt and penalty. The community must know who is responsible for these decisions, and how the responsible individuals are chosen.

The presence of the public also interjects an additional element of impartiality into the *voir dire* process that might otherwise be lost. Although, in theory, both prosecutor and defense counsel desire an impartial jury, in fact, each seeks a jury that will be sympathetic to their point of view. *See,* discussion ***ante*** at pp. 4-6. The public's interest, however, is in ensuring that the selection process produces a group of citizens who will reach a decision that fairly reflects the conscience of the community.

Access to *voir dire* is all the more important in a capital case because of the widespread public concern over the merits of the death penalty. When a defendant is found guilty of a capital offense, society invests twelve community members with the most awesome of responsibilities: the decision of whether that person will be sentenced to death.

Presently, many segments of the population in California are questioning whether the jury system is fully serving the ends of justice. In fact, widespread debate is occurring over the efficacy of the jury system in general, and *voir dire* in particular. Criminal defendants are claiming that the manner in which juries are selected for capital cases in California has prejudiced their fair trial rights.[6] Many similar challenges by defendants can be anticipated, since as of June, 1981, over 350 capital cases were pending in the California trial courts.

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[6]Hearings have been granted by the California Supreme Court in the following cases which challenge *voir dire*: *Word v. Superior Court*, S.F. 24376; *People v. Stankewitz*, (Crim. No. 20750); *People v. Hogan*, (Crim. No. 20943); *People v. Mroczko*, (Crim. No. 21159); *People v. Frank*, (Crim. No. 21353; *People v. Ainsworth*, (Crim. No. 21354); *People v. Holt*, (Crim. No. 21405); and *People v. L. Harris*, (Crim. No. 21633).

There is also widespread concern among the public that criminals are being improperly returned to society. Since "the people" have no appeal from an erroneous acquittal, however egregious, reform of the criminal justice system is the only safeguard available to the public. But the need for, or extent of, any reform is dependent on observing the system in operation. Further, the alternative—conducting critical portions of trials in secret—is certain to foster even greater public distrust of a system that is already under seige.[7]

Diminishing public confidence in the criminal justice system makes the need for public scrutiny of the *voir dire* all the more important.[8] Ultimately, public confidence must be founded upon a belief that the legal system is

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[7]Scholars and practitioners in the field have also joined the debate, further reflecting the widespread public interest in this issue:

Alvarez, Nancy Lewis, *Racial Bias and the Right to an Impartial Jury: A Standard For Allowing Voir Dire Inquiry*, 33 Hastings L.J. 959 (1982).

Epstein, Jeffrey M., *Criminal Procedure—Voir Dire—The California Supreme Court Permits Voir Dire to Be Conducted To Uncover a Basis for Peremptory Challenges*, 4 Whitt. L. Rev. 169 (1982).

Fieldscope Report: Attitudes Toward the Death Penalty Among The California Adult Public, Field Research Corp. of San Francisco for the National Council of Crime and Delinquency (March 1981).

Hunt, P.A., *Minimizing Racism in Jury Trials—Voir Dire Conducted by Garry, C.R. in People of California v. Newton, H.P.*, 65 Law Library Journal 110 (1972).

Millet, Craig H., Waine, Tina I., *Voir Dire Examinations*, 8 Pepperdine L. Rev. 504 (1981).

Moskitis, Richard L., *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 So. Cal. L. Rev. 597 (1976).

Saltzman, Alan, *Jury Voir Dire Expanded*, 94 L.A. Daily J. 4 (July 16, 1981).

[8]*See*, Auerback and Kiernan, "Public Wants Court Reform, Poll Says," *The Washington Post*, March 19, 1978, page A2, discussing the Yankelovich study conducted in 1978 in which only 18 percent of individuals who were familiar with the legal system expressed confidence in the courts. Over 45 percent of the same group had little or no confidence in the legal system.

providing justice to the accused, the victim and society alike.[9]

The public has a right to know whether justice is being done. The lynchpin to that knowledge is an understanding of the qualifications of the twelve individuals who bring the collective judgment of the community into the courtroom. The public must be able to watch and hear, or observe through its media representatives, the procedures by which these twelve persons are adjudged to be competent and unbiased. Ultimately, public understanding and acceptance of our system of law is dependent on such knowledge.

IV

NO SUBSTANTIAL COUNTERVAILING INTEREST IS SERVED BY CLOSURE OF THE VOIR DIRE

In issuing the closure and sealing orders, the trial judge failed to articulate factual findings that would comport with the standards set forth in *Richmond Newspapers*. Nevertheless, the court's order of December 30, 1981, suggests that the trial judge was concerned with the Sixth Amendment rights of the defendant and the privacy rights of the jurors. Unfortunately, the judge misperceived the applicability of those rights in this case, and failed to properly consider what harm, if any, might occur if the *voir dire*

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[9]The public's need to understand and accept the proper function of its jury system is more than an abstract principle. For example, in the 1979 trial of Dan White for the murders of San Francisco's former mayor, George Moscone, and a former county supervisor, Harvey Milk, the jury acquitted White of murder and instead convicted him of manslaughter because of the defense of diminished capacity. The public could neither understand nor accept the jury's decision. As a consequence there was rioting in the streets and ultimately a legislative amendment to California's substantive criminal laws altering the diminished capacity defense. Calif. Pen. Code § 28, as amended by Stats. 1981, Chapt. 404; *see*, Gorney, "After the Riot: The Crisis In San Francisco," *The Washington Post*, May 30, 1979, page B2.

See also, San Francisco Chronicle, March 14, 1983, page 2, concerning public debate over jury verdict of not guilty for defendant on claim of self-defense.

were held in open court, or what less intrusive alternatives could mitigate that harm.

A. An Open Voir Dire Examination Will Not Impair The Defendant's Right To A Fair Trial

The traditional argument advanced to justify closure of courtroom proceedings is the perceived conflict between the Sixth and First Amendments, based on the claim that publicity about the events in court will ultimately prejudice the jury pool, thereby depriving the defendant of a fair trial. *Gannett Co. v. DePasquale, supra,* 443 U.S. at 378-387. In the case of *voir dire,* no such conflict exists.

Under California law, the *voir dire* of a prospective juror normally occurs in the presence of all of the other prospective jurors. *Hovey v. Superior Court, supra,* 28 Cal.3d at 81. Public and press attendance will therefore reveal no additional information to jurors that they have not already learned during the *voir dire* examination of their fellow jurors. The potential for harm from prejudicial publicity arising from public attendance at *voir dire* therefore is minimal.

In contrast, the benefit to the defendant resulting from open *voir dire* examination is great. Both federal and state decisions which specifically have reviewed *voir dire* proceedings in the context of a First Amendment claim by the media, have recognized that open examinations do not infringe upon Sixth Amendment rights. *United States v. Brooklier, supra,* 685 F.2d at 1166-1169; *In re United States ex rel. Pulitzer Pub. Co., supra,* 635 F.2d 676; *Great Falls Tribune v. District Court, Etc., supra,* 608 P.2d at 120-121; *Commercial Publishing Co. v. Lee, supra,* 553 S.W.2d 270.

Indeed, the safeguard provided to the defendant's fair trial rights by public attendance is even more important during *voir dire* than when the testimony of witnesses is being taken. The attorneys for the parties have a sub-

stantial opportunity to investigate the factual basis of the testimony of witnesses. In contrast, there is a comparatively limited ability to explore the backgrounds of potential jurors before commencement of the *voir dire* phase of trial. Thus, in the absence of public exposure, a juror who withholds or gives inaccurate information during *voir dire* is more likely to go undiscovered than the untruthful witness.[10]

An independent check on juror truthfulness is far more necessary than may be commonly perceived. In a study of juror behavior cited in *Hovey,* the empirical evidence indicated that in the hope of being chosen to sit on the panel, "[j]urors often, either consciously or unconsciously, lie on *voir dire.* . . ." Broeder, *Voir Dire Examinations: An Empirical Study* 38 So. Cal. L. Rev. 503, 528 (1965); *see also, People v. Williams, supra,* 29 Cal.3d at 402.

This Court, as well as other courts, has observed that public attendance generally improves both the quality and credibility of testimony. *Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 569. *Globe Newspaper Co. v. Superior Court, supra,* 73 L.Ed.2d at 259, n. 26; *Brian W. v. Superior Court, supra,* 20 Cal.3d 618. The Ninth Circuit Court of Appeals has concluded that the quality of juror answers during the *voir dire* are similarly enhanced by public exposure. *United States v. Brooklier, supra,* 685 F.2d at 1169.

There is no reason to believe this phenomenon would be any less likely to occur during the questions concerning

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[10]The value of public scrutiny during the *voir dire* to a fair trial is illustrated by the case of *Los Angeles Coliseum Commission v. N.F.L.*, No. 78-3523-HP. In that case a member of the public came forward and identified a juror who had failed to disclose during *voir dire* a potential interest in the matter. As a result of news reports, the juror's nondisclosure came to light. This one juror was responsible for a hung jury, and caused the plaintiff to seek his removal. *See,* newspaper articles describing this matter in the appendices to the Petition for Reconsideration in *Oakland Alameda County, et al. v. United States District Court,* Ninth Circuit Court of Appeal Action No. 82-7070 filed on March 3, 1982.

the death penalty, and therefore the death-qualification of jurors presents no different analysis.

Certainly, the California Supreme Court did not intend that any portion of *voir dire* be conducted in secret when it adopted a procedural rule requiring that venire persons be questioned "individually and in sequestration" concerning their attitudes about the death penalty. *Hovey v. Superior Court, supra,* 28 Cal.3d at 80. On the contrary, the Court expressly stated that its decision would not ". . . in any way affect the open nature of a trial." *Id.* at 80-81.

The prejudice to the defendant's fair trial rights suggested in *Hovey* is unrelated to the presence or absence of the public. The *Hovey* court intended to minimize the untoward effects of death penalty questions on other potential jurors. *Id.* The *Brooklier* court also addressed the problem of undue influence on potential jurors as a result of their exposure to the responses of other jurors, concluding that prejudice could be avoided ". . . simply by keeping other potential jurors out of the courtroom while each was questioned." *United States v. Brooklier, supra,* 685 F.2d at 1169.

There is no serious practical impediment presented by allowing public attendance even while other prospective jurors are excluded. The trial judge can instruct the venire panel to avoid media reports of the *voir dire* proceedings if the judge concludes there is a substantial probability that exposure to such reports will cause irreparable harm to the defendant's ability to obtain a fair trial. And in those extremely rare cases where a compelling interest such as the physical safety of prospective jurors requires that their names not become public information, procedures can be devised to withhold the names while at the same time permitting the public to attend the *voir dire. See, e.g., United States v. Layton,* 519 F.Supp. 959 (N.D. Cal. 1981); *United States v. Barnes,* 604 F.2d 121 (2d Cir. 1979).

Hovey v. Superior Court, supra, does not alter this conclusion. Thus, the procedural rule adopted in *Hovey* may be applied in such fashion as to ameliorate any possible conflict between the Sixth Amendment and the First Amendment. Without guidance from this Court, however, trial judges in California will continue to rely on the *Hovey* decision to close *voir dire,* thereby avoiding their constitutional duty to accomodate the interests of both the defendant and the press. *Nebraska Press Asso. v. Stuart,* 427 U.S. 539, 561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

The trial court's approach in this case compounded the constitutional error. By closing the *voir dire* simply on the authority of *Hovey v. Superior Court, supra,* 28 Cal.3d 1, the trial court here (like other trial courts in California) created a *per se* rule of closure without regard to the particular facts of the case before them. In adopting this approach, the trial judge attempted to do judicially what the State of Massachusetts did legislatively by enacting a statute which resulted in per se trial closures. This statute was declared unconstitutional in *Globe Newspaper* for this reason. Regardless of the branch of government from which such a *per se* closure rule emanates, the resulting wholesale denial of public attendance at criminal trials unconstitutionally infringes the right of access protected by the First Amendment.

B. There Is No Privacy Interest Of The Jury Justifying Closure

The trial judge in this case apparently concluded that a right of privacy could permanently shield from public scrutiny the process by which the jurors were chosen to sit in judgment of Albert Brown.[11]

Although this Court has viewed several aspects of an individual's privacy as deserving of protection,[12] not every privacy interest is protectable. *J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981). To date, no state or federal court has found a right of privacy protecting the disclosure of facts relevant to one's qualification to serve as a juror. Indeed, the Second Circuit Court of Appeals has considered the privacy interests of the jury and found that such a right of privacy did not apply to questions asked of jurors during *voir dire* ". . . insofar as their views might relate to the specific charges to be submitted to them." *United States v. Barnes, supra*, 604 F.2d at 135.

The court in *Barnes* accommodated the jurors' interest in safety because of the unique facts of that case by withholding juror names and addresses while still protecting the right of public access to the *voir dire*. The court disallowed unwarranted intrusions into the jurors' private thoughts and accordingly, limited the *voir dire* examination where

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[11]Petitioner cannot know what occurred in the closed courtroom without access to the sealed record; however, it must be assumed the questions asked during the closed proceedings ranged far beyond the death-qualification of the jurors. *Hovey* sanctions a limitation on the *voir dire* only as it relates to death-qualifications. Nevertheless, all but three days of the six-week *voir dire* proceedings were closed to the public in the instant case.

[12]*See e.g., Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 469 [state tort of invasion of privacy]; *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), rehearing denied 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 [matters relating to marriage and procreation]; *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) [marital privacy]; *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) [associational privacy]; *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932) [unreasonable governmental searches and seizures].

". . . the matter sought to be probed by the defendant was too remote from the issues in the case. . . ." *Id.* at 140.

These protective procedures made it unnecessary to deny the public's right to attend the *voir dire,* although the examination included questions about family history, previous dealings with government narcotic agents, previous criminal records of jurors and their family members, health problems and racial attitudes. *Id.* at 135-136. The court implicitly concluded that although certain aspects of individual privacy may be deserving of protection, there can be no privacy interest when the thoughts of a citizen called to serve on a jury are relevant to the individual's impartiality. *Id.* at 135. *Accord, Voir Dire Limitations As A Means Of Protecting Jurors' Safety and Privacy,* 93 Harv. L. Rev. 782, 792 (1980).

In California, limitations have been established on unnecessary intrusions into certain aspects of an individual's personal life based upon Article I, Section 1 of the California Constitution,[13] various State statutes (*e.g.,* California Government Code Section 6250), and the common law. *See, e.g., Forsher v. Bugliosi,* 26 Cal.3d 792, 163 Cal. Rptr. 628, 608 P.2d 716 (1980).

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[13]The amendment to the California Constitution was adopted in 1972, to provide protection to a specific privacy concern, *i.e.,* to prevent the encroachment upon personal freedom and security caused by increased surveillance and data collection activities. *People v. Privitera,* 23 Cal.3d 697, 709, 153 Cal.Rptr. 431, 591 P.2d 919 (1979). Since the adoption of this amendment, the courts have held that a number of different interests are entitled to constitutional protection, including protection against governmental surveillance of classroom discussions and data-gathering activities [*White v. Davis,* 13 Cal.3d 757, 774-775, 120 Cal.Rptr. 94, 533 P.2d 222 (1975)]; unauthorized dissemination of a student's records to a scholarship and loan agency [*Porten v. University of San Francisco,* 64 Cal.App.3d 825, 832, 134 Cal.Rptr. 839 (1976)]; disclosure of confidential bank records [*Valley Bank of Nevada v. Superior Court,* 15 Cal.3d 652, 656-657, 125 Cal.Rptr. 553, 542 P.2d 977 (1975)]; and, unwarranted discovery requests by litigants [*Richards v. Superior Court,* 86 Cal.App.3d 265, 272-273, 150 Cal. Rptr. 77 (1978).

The federal and California courts, however, have recognized that the right of privacy is circumscribed by rights protected under the First Amendment. In other words, protectable zones of privacy cannot intrude into areas of legitimate public concern. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469; *Forsher v. Bugliosi, supra,* 26 Cal.3d at 809. In the *Forsher* decision, the California Supreme Court found:

> In determining whether a cause of action has been stated, we must consider certain principles relating to the First Amendment, for the right to keep information private often clashes with the First Amendment right to disseminate information to the public. Warren and Brandeis [authors of *The Right of Privacy,* 4 Harv. L. Rev. 193 (1890)] themselves noted the potential conflict between freedom of the press and the right of privacy and suggested that the right should not apply to matters of 'public or general interest.' [Citations omitted.] (*Id.*)

The fact that a prospective juror does not serve voluntarily neither diminishes the public's interest, nor enhances the prospective juror's privacy claim. As this Court stated in *Time, Inc. v. Hill,* 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967):

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

Just as a subpeonaed witness cannot refuse on privacy grounds to give personal information when the information is relevant to the issues being tried, so too a juror cannot

avoid disclosure of personal information when the information is necessary to determine the juror's fitness to decide those issues. Public scrutiny is equally important in each instance.

Moreover, jurors are not troubled by public scrutiny of *voir dire*. One empirical study indicates that more than 90 percent of jurors questioned preferred that *voir dire* be conducted in open court. Broeder, *Voir Dire Examinations: An Empirical Study, supra,* 38 So.Cal.L.Rev. at 526. The study reported that the vast majority of jurors felt that "*voir dire* was not regarded as sufficiently embarrassing or upsetting to require so drastic a change [as closure]." *Id.*

This study belies any claim that potential jurors will be more forthright in disclosing bias behind closed doors. In those rare instances, when reluctance to disclose pertinent information is discovered, a potential juror may be challenged, but that is no basis for closure of the qualification process.

Even if the empirical evidence established that jurors preferred closed *voir dire,* there can be no reasonable or justifiable expectation of privacy concerning the jurors' thoughts and attitudes, so long as those thoughts relate to their competency or impartiality.

Once a citizen is called to serve on a jury and to assume the public responsibility of deciding the issues of guilt or innocence (and life or death in a capital case), that juror's qualifications are a matter of profound public concern. *Voir dire* is the phase of the trial when these qualifications are tested, and since what transpires in the courtrooms of this country is "public property" (*Craig v. Harney, supra,* 331 U.S. at 374), this inquiry may not constitutionally become the subject of a claim of privacy.

The trial court's third order permanently sealing the *voir dire* transcript *after* the trial concluded must have been based upon privacy interests since no Sixth Amend-

ment interest could be affected. In doing so, the trial court impermissibly crossed the boundary separating legitimately protectable privacy interests from the First Amendment right of access to information about criminal trials.

V

CONCLUSION

In every case, where a person is either convicted or acquitted and returned to society, important questions inevitably arise about the manner in which the jury is selected. Did the prosecutor unduly influence the jurors during their examination? Did the defense attorney adequately question prospective jurors to elicit prejudicial bias? Did the trial judge rule on challenges for cause in an evenhanded manner? Were the jurors candid and forthright in responding to *voir dire* questions? Were racial and sexual prejudices effectively eliminated? Such fundamental questions should not be permitted to fester in secrecy, but must be exposed to the cleansing light of public inquiry. Public confidence in the criminal justice system, as well as added protection for the rights of the accused, do not permit less.

Dated: April 8, 1983.

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